# Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Bhd) v Mahany Sawal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-03–234 OF 2009
RAUS SHARIF PCA, AZHAR MA'AH AND APANDI ALI JJCA
20 JULY 2012

*Limitation — Action upon judgment — Interest, recovery of — Sabah Limitation Ordinance ('Ordinance') — Whether limitation period for recovery of interest under judgment was 12 years — Whether Item 98 of the Schedule to Sabah Limitation Ordinance applied — Whether bankruptcy notice claiming interest on judgment for more than three years accordingly valid because it was action upon judgment — Whether Item 45 of the Schedule only applied when no judgment was obtained and claim was for interest upon money due*

The respondent judgment debtor ('JD') applied to set aside a bankruptcy notice ('BN') filed by the appellant judgment creditor ('JC') on the ground, inter alia, that the amount stated as due in the BN included interest for more than three years from the date it became due in breach of Item 45 of the Schedule to the Sabah Limitation Ordinance ('the Ordinance'). The JD contended that although what was claimed in the BN was interest due under a judgment, Item 45 applied as it prescribed a limitation period of three years for the recovery of interest on money due from a defendant to a plaintiff and that time ran from when the interest became due ie the date of the judgment. The deputy registrar dismissed the JD's application. On appeal to the judge, the application was allowed and the BN was set aside. The judge held, inter alia, that while a bankruptcy proceeding was an action on a judgment and that Item 98 of the Schedule to the Ordinance allowed a limitation period of 12 years to recover the principal sum under the judgment, the recovery of interest under the judgment was caught by Item 45. As a result, the judge held the BN was defective as it included a claim for interest for more than three years. The JC appealed the decision to the Court of Appeal.

**Held**, allowing the appeal with costs:

(1) The BN was not an action 'for money payable for interest upon money due' but was an action or proceeding based on a judgment. Thus it must be governed by Item 98. Item 45 clearly spoke of a claim for interest upon money due from the defendant to the plaintiff and the limitation period that was attached to it was three years. Item 98, on the other hand, dealt with judgment obtained, and the limitation period that was attached to it was 12 years (see para 19).

(2) Since there were no provisions in the Ordinance for any period of limitation for interest in respect of a judgment debt, the only applicable provision would be Item 98 which allowed for a period of 12 years within which to bring a suit upon a judgment. Since the BN here was a suit upon a judgment and the claim for interest in the BN was made in 1998, which was only 10 years after the date of the judgment, it was well within the limitation period (see para 20).

(3) The High Court judge had erred when she relied on the case of *Re Lim Szu Ang, Ex Parte Kewangan Utama Bhd* [2005] 7 MLJ 487 and concluded that Item 45 was akin to the second and first limbs of s 6(3) of the Limitation Act 1953 (see para 22).

**[Bahasa Malaysia summary**

Responden penghutang penghakiman ('JD') memohon untuk mengenepikan notis kebankrapan ('NK') yang difailkan oleh perayu pemiutang penghakiman ('JC') atas alasan, antara lain, bahawa jumlah yang dinyatakan sebagai kena bayar di dalam NK termasuk faedah untuk lebih daripada tiga tahun dari tarikh ia kena dibayar dalam memungkiri Item 45 Jadual kepada Ordinan Had Masa Sabah ('Ordinan'). JD berhujah bahawa walaupun apa yang dituntut di dalam NK adalah faedah yang patut dibayar di bawah penghakiman, Item 45 beraplikasi kerana ia menetapkan tempoh had masa selama tiga tahun untuk mendapatkan balik faedah atas wang yang kena di bayar oleh defendan kepada plaintif dan masa berjalan apabila faedah kena dibayar iaitu tarikah penghakiman. Timbalan pendaftar menolak permohonan JD. Atas rayuan kepada hakim, permohonan tersebut dibenarkan dan NK diketepikan. Hakim memutuskan, antara lain, bahawa sementara prosiding kebankrapan adalah tindakan atas penghakiman dan bahawa Item 98 Jadual kepada Ordinan membenarkan tempoh had masa 12 tahun untuk mendapat balik jumlah prinsipal di bawah penghakiman, mendapatkan balik faedah tersebut di bawah penghakiman memungkiri Item 45. Akibatnya, hakim memutuskan NK tersebut adalah cacat kerana ia memasukkan tuntutan untuk faedah untuk lebih daripada tiga tahun. JC merayu keputusan kepada Mahkamah Rayuan.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) NK bukan tindakan 'for money payable for interest upon money due' tetapi tindakan atau prosiding berdasarkan penghakiman. Oleh itu ia mesti dikawal oleh Item 98. Item 45 jelas menyatakan mengenai tuntutan untuk faedah ke atas wang yang kena dibayar daripada defendan kepada plaintif dan tempoh had masa yang ditetapkan olehnya adalah tiga tahun. Sebaliknya, Item 98, berurusan dengan penghakiman yang diperolehi, dan tempoh had masa yang diteapkan olehnya adalah 12 tahun (lihat perenggan 19).

(2) Memandangkan tidak terdapat peruntukan di dalam Ordinan untuk

apa-apa tempoh had masa untuk faedah berkaitan hutang penghakiman, satu-satunya peruntukan yang beraplikasi ialah Item 98 yang membenarkan tempoh 12 tahun dalam mana untuk memfailkan tindakan atas penghakiman. Memandangkan NK di sini adalah tindakan atas penghakiman dan tuntutan untuk faedah di dalam NK dibuat pada 1998, yang mana hanya 10 tahun selepas tarikh penghakiman, oleh itu ia adalah dalam tempoh had masa (lihat perenggan 20).

(3) Hakim Mahkamah Tinggi telah tersilap apabila beliau bergantung ke atas kes *Re Lim Szu Ang, Ex Parte Kewangan Utama Bhd* [2005] 7 MLJ 487 dan memutuskan bahawa Item 45 serupa dengan bahagian kedua dan pertama s 6(3) Akta Had Masa 1953 (lihat perenggan 22).]

**Notes**

For a case on interest, recovery of, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) para 2120.

**Cases referred to**

*Catherine L Masry Ex Parte Affin-ACF Finance Bhd, Re* (unreported) (refd)
*Chin Sin Lan v Delta Finance Bhd* [2004] 3 MLJ 178; [2004] 3 CLJ 113, CA (refd)
*Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426, SC (refd)
*Johan Hj Abd Hamid; ex parte Hong Leong Bank, Re* (Bankruptcy Petition K 29–171 of 2007) (unreported) (refd)
*Lim Szu Ang, Ex Parte Kewangan Utama Bhd, Re* [2005] 7 MLJ 487; [2005] 7 CLJ 23, HC (not folld)
*Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263, SC (refd)
*Perwira Affln Bank Ltd v Lim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)
*United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385; [2002] 2 CLJ 413, FC (refd)
*Yau Kin Mun, ex parte Public Bank Bhd, Re* [1999] 5 MLJ 497; [1999] 3 CLJ 412, HC (refd)
*Yong Tet Yin (NRIC No H0284406) ex parte United Overseas Bank Ltd, Re* (unreported) (refd)

**Legislation referred to**

Bankruptcy Act 1967 ss 3, 3(1)(i), 131
Bankruptcy Rules 1969 r 274
Indian Limination Ordinance [IND] Item 25
Limitation Act 1953 s 6(3)
Sabah Limitation Ordinance (Cap 72) s 6(3), Schedule, Items 45, 98

**Appeal from:** Bankruptcy Notice No 29-171 of 1998 (High Court, Sandakan)

*Jeyan Marimuttu (Datuk John Sikayun with him) (Luping and Co) for the appellant.*
*Edwin Tsen (Tan Pang Tsen and Co) for the respondent.*

**Raus Sharif PCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This is an appeal by the appellant against the decision of the learned judicial commissioner on the 26 June 2009, in allowing the respondent's appeal against the decision of the deputy registrar ('registrar'). The registrar had earlier dismissed the respondent's application dated 9 February 1999 to set aside the appellant's bankruptcy notice dated 6 August 1998 with costs.

**[2]** The appellant is the judgment creditor ('JC') and the respondent is the judgment debtor ('JD'). For convenience, parties will be referred to as JC and JD as in the court below.

BACKGROUND FACTS

**[3]** The facts that form the core of this appeal may be briefly set out as follows.

**[4]** On 6 August 1998 the JC filed a bankruptcy notice ('BN') against the JD. The BN was based on the judgment dated 24 March 1988 (judgment) obtained by JC against the JD under the Kuala Lumpur High Court Suit No C 23–1737 of 1986 for the judgment sum of RM2,605,828.

**[5]** The JC had also obtained an order dated 23 March1998 ('the said order') for leave to execute on the said judgment.

**[6]** On the 7 April 1999 the JC filed an amended BN. In the amended BN the JC demanded for the payment of the debt pursuant to the judgment which includes the sum of RM6,743,267.39, being the interest calculated from 1 May 1985–6 August 1998.

**[7]** On 9 February 1999 the JD filed an application to set aside the BN on various grounds (setting aside application).

**[8]** On 28 January 2000 the setting aside application was duly heard and dismissed by the learned deputy registrar. The JD appealed against the decision of the deputy registrar.

**[9]** The learned judicial commissioner allowed the appeal by the JD and set aside the JC's amended BN dated 7 April 1999 with costs. Hence this appeal to this court.

**[10]** The learned judicial commissioner in allowing the setting aside of the BN held, inter alia:

(a) that Item 45 of the Schedule to the Ordinance applies to the present case for the recovery of interest due on the judgment. Item 45 provides a limitation period of three years to recover interest on money due from the defendant to the plaintiff and the time begins to run from when the interest becomes due ie the date of judgment (*Perwira Affin Bank Bhd v Lim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787 (FC); *Re Yau Kin Mun, ex parte Public Bank Bhd* [1999] 5 MLJ 497; [1999] 3 CLJ 412; *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385; [2002] 2 CLJ 413 (FC));

(b) that a bankruptcy proceeding is an action on judgment and by virtue of Item 98 of the Schedule to the Ordinance the limitation period of 12 years applies for the recovery of the principle sum based on the judgment. However the recovery of interest is subjected to Item 45; and

(c) that the purported BN is defective since it includes a claim for interest outside the three years provided under Item 45 of the Schedule to the Ordinance.

SUBMISSIONS

**[11]** Before us the learned JC's counsel submitted that the learned judicial commissioner having correctly found that the limitation period for action based on judgment is 12 years under Item 98 of the Schedule to the Ordinance erred in fact and in law when she went on to hold that the recovery of interest due on the judgment is caught by Item 45 of the Schedule to the Ordinance.

**[12]** Learned counsel submitted that Item 45 has no application to bankruptcy proceedings as it is not an action for money payable for interest upon money due, but an action or proceeding based on a judgment which is governed by Item 98. He submitted that Item 45 is clearly not dealing with interest in respect of a judgment debt but merely in relation to a general claim for interest for money due from a defendant. Item 45 imposes a time-bar in relation to a suit for recovery of interest prior to judgment. In support thereof he referred us to the case of *Chin Sin Lan v Delta Finance Bhd* [2004] 3 MLJ 178; [2004] 3 CLJ 113 and *Re Catherine L Masry Ex Parte Affin-ACF Finance Bhd (unreported)*. He added further that the original action may be an action on

money lent on interest which would be caught by Item 45 of the Ordinance; but, however once the judgment is given then all sums due including any interest are merged into the judgment sum. In support thereof he referred us to the unreported case of *Re Johan Hj Abd Hamid; ex parte Hong Leong Bank* (Bankruptcy Petition K 29–171 of 2007)

**[13]** In this regard the learned counsel referred us to s 3(1)(i) of the Bankruptcy Act 1967 which entitles that the demand in the bankruptcy notice to be made for the entire judgment debt computed to the date of the filing of the bankruptcy notice, ie one sum which is inclusive of interest to the date of the bankruptcy notice. In a similar breath, learned counsel submitted that even if some of the debt is statute-barred, there is still the principal debt which is more than sufficient to support the bankruptcy notice and consequently the adjudication. In support thereof he referred us to the case of *Re Yong Tet Yin (NRIC No H0284406) ex parte United Overseas Bank Ltd and Re Johan Hj Abd Hamid, ex parte Hong Leong Bank* (Bankruptcy Petition K 29–171 of 2007).

**[14]** The learned JD's counsel conversely submitted that the JC is precluded from claiming interest exceeding three years either from the date of the purported guarantee ie 24 August 1985 or judgment ie 24 March 1988 by virtue of Item 45. He submitted that the interest claimed outside the period of three years that is allowed should not have been included. In support thereof he referred us to the case of *United Malayan Banking Corp Bhd v Ernest Cheong Yung Yin* [2002] 2 MLJ 385; [2002] 2 CLJ 413.

**[15]** Learned counsel further submitted that Item 45 of the Schedule to the Ordinance is of general application and wider in its scope and extends generally to all interest upon money due from the defendant to the plaintiff which cannot be recovered three years after the interest becomes due. To illustrate further learned counsel made comparison to Item 25 to the Indian Limitation Act which is in pari materia with Item 45 of the Sabah Limitation Ordinance. Learned counsel submitted that under the Indian Limitation Act, a bank is precluded from claiming interest beyond three years.

**[16]** Learned counsel also submitted that the BN was bad in law and has no legal effect as it does not quantify the interest payable under the judgment debt as provided under s 3(1)(i) of the Bankruptcy Act 1969. The counsel highlighted to us that the computation of interest should be based on RM2,605,828 and not 'capitalised or compounded' as it had been done in this case. Further to this learned counsel also highlighted to us that the JC had 'lumped up' the interest due and owing under the judgment with no details or proof. In this regard learned counsel submitted to us that the sum in the BN must be certain and not ambiguous and if the sums are ambiguous and uncertain such a defect is not a mere irregularity and is not curable. Learned

counsel based his arguments by making reference to s 131 of the Bankruptcy Act 1967; r 274 of the Bankruptcy Rules 1969; s 3 of the Bankruptcy Act 1967; the cases of *Fawzia bt Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426 and *Low Mun v Chung Kiaw Bank* [1988] 1 MLJ 263.

FINDINGS

**[17]** There is no dispute in this case that the BN was based on the judgment sum which includes interest. The issue is whether Item 45 or Item 98 of the Schedule to the Ordinance is applicable in calculating the limitation period. In other words in claiming for interest on the judgment sum are the parties subjected to the three years cap as spelled out by Item 45. For better understanding, it will be convenient to set out here the provisions of Item 45 and Item 98 to the Schedule of the Ordinance.

**[18]** Item 45 and Item 98 of the Schedule to the Ordinance reads as follows:

| Description of Suit | Period of Limitation | Time from which period begins to |
|---|---|---|
| 45. For money payable for Interest upon money due from the defendant to the plaintiff. | 3 years | When the interest becomes due. |
| 98. Upon a Judgment obtained in the colony or a recognizance. | 12 years | The date of the Judgment or recognizance. |

**[19]** We are of the view that the salient provision of Item 45 clearly speaks of a claim for interest upon money due from the defendant to the plaintiff and the limitation period that is attached to it is three years. Item 98 on the other hand deals with judgment obtained; and, the limitation period that is attached to it is 12 years. In the present case, the BN was not an action for money payable for interest upon money due, but rather an action or proceeding based on a judgment. Thus it must be governed by Item 98.

**[20]** Thus we are unable to agree with the JD's contention that there should be a bar to the JC's claim for interest in bankruptcy cases outside the period of three years. In this regard we are more inclined to accept the JC's contentions that since there are no provisions in the Ordinance for any period of limitation

for interest in respect of a judgment debt; hence, the only applicable provision would be Item 98: which allows for a period of 12 years within which to bring a suit upon a judgment. Since the BN here is a suit upon the judgment and the claim for interest in the BN was made in 1998, which is only ten years after the date of the judgment, we find that it is well within the limitation period.

**[21]** In fact this issue had been dealt with by Ian Chin J in the unreported case of *Re Yong Tet Yin* (NRIC No H0284406) *ex parte United Overseas Bank Ltd* (Bankruptcy Petition No K 29(P)-197 of 1994, where he held that:

> … As for the question of interest being statute-barred, even if I allow it to be considered it would nevertheless fail because the argument of the debtor was premised on Item 45 of the Schedule to the Sabah Limitation Ordinance which does not apply to a judgment or interest due on judgment interest due under judgment is governed by Item 98 and has a limitation of 12 years from the date of the judgment.

Similarly, in another unreported case of *Re Johan Hj Abd Hamid, ex parte Hong Leong Bank* (Bankruptcy Petition K 29–171 of 2007) Ian Chin J remarked that:

> … There is no separate provision to govern the interest payable under judgment unlike the Malaysian Limitation Act 1953 s 6(3) which dealt specifically with the arrears of interest of a judgmentand specified a six-year limitation period and with which provisions *United Malayan Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 386 was concerned with. Thus, even assuming that all part payments made by the debtor subsequent to the judgment could not revive the limitation for interest due is correct, the debtor would still fail in his argument as the limitation is 12 years.

The same principle was adopted and followed in the case of *Re Catherine L Masry Ex Parte Affin-ACF Finance Bhd* (unreported) by Clement Skinner J (as His Lordship then was).

**[22]** We share the same view. Thus, the reliance placed by the JD to the cases of *Re Lim Szu Ang, Ex Parte Kewangan Utama Bhd* [2005] 7 CLJ 23; *Re Yau Kin Mun, Ex Parte Public Bank Bhd* [1999] 3 CLJ 412; and *United Malayan Banking Corp Bhd v Ernest Cheong Yung Yin* [2002] 2 MLJ 385; [2002] 2 CLJ 413 (FC) does not lend credence to them as it clearly deals with statutes and provisions which are alien to the State of Sabah. On a similar note, we also find that the learned judicial commissioner had erred when she relied on the case of *Re Lim Szu Ang; ex parte Kewangan Utama Bhd* and concluded that Item 45 is akin to the second and first limb of s 6(3) of the Limitation Act 1953.

**[23]** As for the other issues raised in this appeal ie the issue of wrongful computation of interest and the BN being ambiguous and defective, we are of the view that it is too late in the day to raise these issues here at this point. The learned judicial commissioner had rightfully pointed out in her judgment that

A the JD having receipt of the BN and the affidavits by the JC had failed to reply to the same. The failure on their part to rebut the amount claimed by the JC would then mean it is deemed to be admitted.

B **[24]** In the circumstances, we are unanimous in our decision that this appeal must succeed. We therefore allow the appeal with costs.

*Appeal allowed with costs.*

C Reported by Ashok Kumar

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